

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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| UNITED STATES OF AMERICA | : | |
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| | : | |
| v. | : | Case No. 2:18-cr-55-1 |
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| DANIEL TUCKER, | : | |
| | : | |
| Defendant. | : | |

Opinion and Order

Defendant Daniel Tucker is charged with conspiracy to distribute narcotics. Tucker has filed a motion to suppress physical evidence, arguing that the police conducted an unconstitutional "protective sweep" of his hotel room. For the reasons set forth below, Defendant's motion to suppress is **denied**.

Factual Background

1. The Events of April 27, 2018

On April 27, 2018, at approximately 4:40 p.m., Detective DiFiore ("DiFiore") of the South Burlington Police Department was parked in the parking lot of the Days Inn in Colchester, Vermont. ECF 17-1 at 3. A black male dressed in dark clothing approached the driver's side of Detective DiFiore's unmarked vehicle and asked for a lighter. *Id.* Detective DiFiore told the

man he did not have a lighter and the man then asked Difiore if he was looking for something. *Id.* Difiore told the man that he was looking for a "B" (referring to a bundle of heroin). *Id.* The man told Difiore he "must be looking for Zock," to which Difiore replied that he might be. *Id.* The man told Difiore he would "go get it." ECF 17-1 at 3.

This interaction jogged Difiore's memory and he recalled an incident from 2015 where he seized approximately 430 bags of heroin and \$17,000 from Daniel Tucker, who also went by the alias "Zak" (pronounced 'Zock'). *Id.* Detective Difiore alerted other detectives of the situation. *Id.*

After approximately five minutes, the man came out of the hotel, accompanied by another black male. *Id.* Difiore again told them he was looking for a "B," at which point one of the men asked for Difiore's name. *Id.* Difiore told them his name was Adam. *Id.* One of the men (it is unclear whether it was the first or second) walked away, saying that he did not know Difiore. ECF 17-1 at 3.

Difiore then identified himself as a police officer, and the man who was still by the car said he did not know the other man and that they were not together. *Id.* Difiore told him that he had seen them walking out of the hotel together. *Id.*

Two other South Burlington Police Department officers, Detective Bataille and Sergeant Eno, arrived at the hotel as

Detective Difiore went to speak with the on-duty hotel clerk. *Id.* The hotel clerk informed Difiore that the two men had checked into the hotel together two days ago but did not know which room they were staying in. *Id.* Both men provided Difiore with names, but neither name appeared on the guest list or in-house ledger. *Id.* From Difiore's training and experience, he knew that people involved in illegal activity often have a third party rent a hotel room to avoid detection by law enforcement. *Id.*

At this time, both of the men were still standing with each other, though one man again asserted he was not with the other one. ECF 17-1 at 4. Both men told Difiore they were from New York City and in Vermont on a trip. *Id.* Neither gave more details about the purpose of their visit to Vermont. *Id.*

One of the men identified himself as George Alston ("Alston") and told Difiore that he was homeless and had "caught a ride" to Vermont. *Id.* He did not tell Difiore who gave him a ride, but stated that he uses drugs and showed Difiore track marks on his arms from his drug use. *Id.* The other man gave the name "Ismael Brooks." *Id.*

At this point, one law enforcement officer noticed a small bag on the ground, which was consistent with the packaging of heroin. *Id.* The bag had not been there previously, and was dry

even though it had been raining recently, leading Difiore to believe that one of the two men had dropped it. *Id.*

Both men were placed in handcuffs. ECF 17-1 at 4. The name Ismael Brooks revealed an arrest warrant from New Jersey when searched in a database. *Id.* However, this man was taken into custody as "John Doe," because the law enforcement officers believed he was giving them a false name. *Id.* Alston was released. *Id.*

Sometime later, the hotel clerk told another law enforcement officer on the scene, Detective Trooper Jon Prack, that someone was calling the hotel and asking for room 324. *Id.* The person had called multiple times and was attempting to disguise their voice, but the clerk believed it was Alston. *Id.* The clerk informed police that room 324 had been reserved by Timothy Parrow, who had provided credit card information to reserve room 324. *Id.* The room had been paid for, however, in cash. *Id.*

Detective Prack and Sgt. Eno went to room 324 to do a "knock and talk." ECF 17-1 at 4. Detective Prack testified that after knocking on the door, about 30 seconds to a minute passed before the door was opened. A woman answered the door and identified herself as Jessica Simmonds. ECF 17-1 at 4. Simmonds told the officers that she had come up to Vermont with two men from New Jersey, and identified one of them as "Z." ECF 17-1 at

4-5. She said that both men had been in the room previously, neither of them had jobs, and she did not know why they were all in Vermont. ECF 17-1 at 5. The officers asked for consent to search the room and Simmonds denied, explaining that it was not her room so she did not think she had the ability to consent. *Id.*

Law enforcement officers then entered the room and did a "protective sweep" in order to secure the room while a search warrant application was being written and submitted. *Id.* During the protective sweep, one of the officers observed a plastic bag sitting on the night stand, which contained an unknown white powder. *Id.* This observation was included in the search warrant application. *Id.*

Meanwhile, the man who identified himself as Ismael Brooks was transported to the South Burlington Police Department to be fingerprinted and photographed. ECF 17-1 at 5. The man revealed that his name was Daniel Tucker. *Id.* A records check indicated that Tucker was on federal probation and he was not supposed to leave the state of New Jersey. *Id.* Officers also confirmed that this was the same Daniel Tucker that Difiore remembered encountering in 2015. *Id.* As Tucker removed his shoes to be placed in a holding cell, a bag of heroin fell out of one of his shoes. *Id.*

Later in the evening of April 27, 2018, Judge Nancy Waples signed a search warrant permitting the search of room 324. ECF 17-1 at 6. During the search, law enforcement found fentanyl, heroin, and crack cocaine. ECF 19 at 4.

2. The Current Motion to Suppress

Tucker now moves to suppress "all physical evidence obtained by law enforcement as a result of the unlawful search and seizure of his hotel room on April 27, 2018." ECF 17 at 1. Tucker argues that law enforcement violated his Fourth Amendment rights by impermissibly conducting a "protective sweep" of his hotel room prior to obtaining a search warrant: "[l]aw enforcement did not have authority to enter that hotel room and the impermissible 'protective sweep' and the observations made during that sweep were unlawfully obtained." *Id.* Tucker argues that this unlawfully obtained evidence was crucial to the issuance of the search warrant and all evidence seized as a result of the search warrant should be suppressed. *Id.*

Discussion

The Court finds the protective sweep at issue was reasonable and lawful in light of the circumstances. First, agents had probable cause to believe that drugs would be found in room 324. Two men, one of whom was called "Zak," had begun a drug interaction with a police officer, stating that they would "go get" a bundle of heroin. ECF 17-1 at 3. A bag of heroin, dry

even though it had been recently raining, had been found next to the two men. ECF 17-1 at 4. One of the men, later revealed to be Tucker, lied to the police about his name. *Id.* The other man admitted to law enforcement that he was a drug user and, once released, repeatedly called the hotel trying to speak to someone in room 324. *Id.* The occupant of room 324 told law enforcement agents that she had traveled to Vermont with two men, one of whom she called "Z." ECF 17-1 at 5. She was unable to give any more information about their reason for visiting Vermont. *Id.*

Even with probable cause, however, a warrantless entry into a hotel room is "presumptively unreasonable" unless "exigent circumstances demand police act speedily." *United States v. Fields*, 113 F.3d 313, 322-23 (2d Cir. 1997). Exigent circumstances exist when either the evidence sought is in imminent danger of destruction or if the safety of the public or law enforcement is threatened. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

The facts discussed above prompted law enforcement officers to obtain a search warrant. While the warrant application was pending, however, the officers had concerns that there may be another person in the room who could possibly destroy evidence or endanger their safety. As the Supreme Court held in *Kentucky v. King*, "the need to prevent the imminent destruction of evidence has long been recognized as a sufficient justification

for a warrantless search." *Kentucky v. King*, 563 U.S. 452, 460 (internal quotations omitted). A brief sweep of the hotel room, done in order to locate any persons hiding therein and prevent the possible destruction of evidence, was reasonable and lawful.

Even if the officer's sweep of room 324 had not been lawful, Defendant's motion to suppress would still not succeed: the warrant application contained sufficient facts to establish probable cause without the white powder observed during the protective sweep. "The mere inclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to the warrant. . . . A reviewing court should excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant." *United States v. Trzaska*, 111 F.3d 1019, 1026 (2d Cir. 1997)(quoting *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987)).

Probable cause exists where circumstances indicate a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "[T]his is a 'fluid' standard, which is not usefully analogized to a prima facie case, or even to a preponderance (i.e., more likely than not) showing of criminal activity." *Ganek v. Leibowitz*, 874 F.3d 73, 83 (2d Cir. 2017), see also *Florida v. Harris*, 568 U.S. 237, 244 (2013)(observing that

probable cause is "practical," "common-sensical," "all-things-considered" standard), *United States v. Martin*, 426 F.3d 68, 74 (2d Cir. 2005) ("A judge's probable-cause determination is not overly strict.").

The search warrant application revealed that Tucker was in Vermont in violation of his federal probation, and that he had been carrying heroin in his shoe. ECF 17-1 at 5. Tucker had previously been arrested in Vermont with over 400 bags of heroin. ECF 17-1 at 3, 5. The search warrant also detailed, completely separate from the protective sweep, that Tucker and Alston had begun a drug transaction with a police officer, that Tucker lied about his name, that Alston was a drug user who repeatedly tried to contact room 324, and that the occupant of room 324 described coming to Vermont for a mysterious reason with men who fit the description of Tucker and Alston. These facts alone indicated a fair probability that contraband or evidence of a crime would be found in room 324, and thus provided probable cause for Judge Waples to issue the search warrant.

In sum, the officers' sweep of room 324 was lawful and, even if it had not been, there was still ample basis for probable cause. Defendant's Motion to Suppress is denied.

Conclusion

For the reasons set forth above, Defendant's Motion to Suppress is **denied**.

DATED at Burlington, in the District of Vermont, this 29th day of January, 2019.

/s/ William K. Sessions III
William K. Sessions III
District Court Judge